

REDACTED DECISION – DK# 11-022 C – BY – A.M.”FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION on JULY 19, 2011, ISSUED ON DECEMBER 20, 2011

FINAL DECISION

SYNOPSIS POINTS

WEST VIRGINIA OFFICE OF TAX APPEALS -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the petitioner to show that any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

CONSUMERS SALES AND SERVICE TAX -- “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.” W. Va. Code Ann. § 11-15-3(a) (West 2010).

CONSUMERS SALES AND SERVICE TAX -- “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (West 2010).

CONSUMERS SALES AND SERVICE TAX -- “Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1 (1993).

CONSUMERS SALES AND SERVICE TAX -- “If any vendor fails to collect the tax imposed by section three of this article, he shall be personally liable for such amount as he failed to collect.” W. Va. Code Ann. § 11-15-4(a) (West 2010).

CONSUMERS SALES AND SERVICE TAX OFFICER LIABILITY -- Officers of an association or corporation “shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed . . . may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010).

CONSUMERS SALES AND SERVICE TAX OFFICER LIABILITY -- “If the taxpayer or vendor is an association or corporation, the officers, thereof, shall be personally liable, jointly and severally, for any default in the reporting or payment of taxes on the part of the association or corporation. Payment of the consumers sales and service tax and any additions to tax, penalties and interest thereon imposed by W. Va. Code § 11-10-1 et seq. may be enforced against such officers as against the association or corporation which they represent.” W. Va. Code R. § 110-15-17.1 (1993).

CONSUMERS SALES AND SERVICE TAX OFFICER LIABILITY -- An association is defined as “any two or more persons who have voluntarily joined together to transact or engage in business activity, and who are not a corporation or partnership, whether or not the association is authorized or qualified to do business in this State and whether for profit or not for profit. An association includes, but is not limited to, any business, charitable, fraternal, beneficial, historic, veterans, or labor organization, society, foundation, federation, lodge, club or order, or any subordinate association or auxiliary thereof, that is not incorporated.” W. Va. Code R. § 110-15-4a.3 (1993).

CONSUMERS SALES AND SERVICE TAX OFFICER LIABILITY -- “The officers of a corporation or association that are personally liable for consumer [sic] sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or by-laws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who performs duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and trustees. A person such as an incorporator, shareholder, member or employee of a corporation or association is not considered to be an officer subject to personal liability.” W. Va. Code R. § 110-15-4a.5 (1993).

CONSUMERS SALES AND SERVICE TAX OFFICER LIABILITY -- “An officer may be personally liable whether or not the officer was under a duty to pay the tax or was responsible for the payment of the tax, for, or on behalf of, the corporation or association, and whether or not the officer acted willfully, or with the intent to evade the tax or payment thereof.” W. Va. Code R. § 110-15-4a.5.2 (1993).

CONSUMERS SALES AND SERVICE TAX OFFICER LIABILITY – The West Virginia Supreme Court of Appeals has articulated a fundamental fairness test when it comes to holding officers personally responsible for the unpaid consumers sales and service taxes of a corporation or association. *Schmehl v. Helton*, 662 S.E.2d 697, 222 W.Va. 98 (2008).

CONSUMERS SALES AND SERVICE TAX OFFICER LIABILITY -- Petitioner has met his burden by clear and convincing evidence that he was not a responsible officer of Bragg N Cox, LLC, and as such is not personally responsible for that business’ unpaid sales tax as assessed.

FINDINGS OF FACT

1. On December 12, 2003, Petitioner, along with his cousin, Mr. A, opened an auto mechanic shop located in West Virginia.

2. Petitioner and Mr. A were the only members and organizers of this limited liability company.

3. Petitioner and his cousin opened a checking account in the name of the company, each with signature authority at a bank in West Virginia; they also opened a line of credit at a local Auto Parts store.

4. A few months after the business opened, Petitioner got into a fight with his cousin and left the company.

5. After leaving the business, Petitioner visited the bank and signed a document to have his name removed from the company's checking account. He then removed his name from the line of credit at the Auto Parts store. Petitioner, however, failed to remove his name from the business registration records that are kept by the office of the West Virginia Secretary of State.

6. The company's business registration was revoked on September 10, 2004, by the office of the West Virginia Secretary of State, presumably for having not filed annual returns with that office.

7. The company, went out of business on or about June 30, 2005.

8. An assessment of unpaid sales taxes was issued by the West Virginia State Tax Department (hereinafter Respondent) against the company. The date and specifics of this original assessment are not known, as that particular assessment was not introduced at the evidentiary hearing.

9. The assessment against the company, apparently went unpaid, and on January 5, 2011, the Respondent, pursuant to West Virginia Code Section 11-15-17, issued an assessment

against Petitioner as a responsible officer of the company, in the amount of \$____, which included interest and additions, for tax periods March 31, 2006, through June 30, 2007, and tax periods ending September 30, 2007, December 31, 2007, March 31, 2008, and June 30, 2008.

10. As a result of the officer assessment that was issued on January 5, 2011, Respondent seized Petitioner's 2010 state income tax refund in the amount of \$____. At the evidentiary hearing Respondent's counsel represented that those funds were being held by the Respondent pending the outcome of this case, and that they would be released to the Petitioner if he was found not liable as a responsible officer of the company.

PROCEDURAL HISTORY

Upon receiving the officer assessment, Petitioner made a timely appeal to the West Virginia Office of Tax Appeals on January 13, 2011. An evidentiary hearing was held in Bridgeport, West Virginia, as scheduled on July 19, 2011. Petitioner appeared *pro se*, and the Respondent appeared by Michael V. Marlow, Staff Attorney, West Virginia State Tax Department. At the conclusion of the proceedings, the record was closed and the matter became mature for decision.

ISSUES AND BURDEN OF PROOF

The legal question to be answered in this case is whether the Petitioner is a responsible officer of the company, and, as such, personally responsible for that business' unpaid sales tax, as assessed. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the petitioner to show that any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See W. Va. Code Ann. § 11-10A-10(e)* (West 2010) and *W. Va. Code R. § 121-1-63.1* (2003).

DISCUSSION

To begin with, West Virginia Code Section 11-15-3(a) holds that, “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.”¹ Further, West Virginia Code Section 11-15-4 states that, “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. §§ 11-15-3 (a) and 11-15-4 (West 2010).

According to West Virginia Code of State Rules Section 110-15-4.1, “Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before, or at the time, such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1 (1993). Additionally, pursuant to West Virginia Code Section 11-15-4(a), “If any vendor fails to collect the tax imposed by section three of this article, he shall be personally liable for such amount as he failed to collect.” W. Va. Code Ann. § 11-15-4(a) (West 2010).

The West Virginia consumers sales and service tax statute provides that officers of an association or corporation “shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed . . . may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010). Pursuant to West Virginia Code of State Rules Section 110-15-17.1, “If the taxpayer or vendor is an

¹ Vendor means “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. § 11-15-2(z) (West 2010). The amount of consumers sales and service tax is “six cents on the dollar of sales or services, excluding gasoline and special fuels, which remain taxable at the rate of five cents on the dollar of sales.” W. Va. Code Ann. § 11-15-3(b) (West 2010).

association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default in the reporting or payment of taxes on the part of the association or corporation. Payment of the consumers sales and service tax and any additions to tax, penalties and interest thereon imposed by W. Va. Code § 11-10-1 et seq. may be enforced against such officers as against the association or corporation which they represent.” W. Va. Code R. § 110-15-17.1 (1993).

An association is defined in West Virginia Code of State Rules Section 110-15-4a.3 as, “any two or more persons who have voluntarily joined together to transact or engage in business activity, and who are not a corporation or partnership, whether or not the association is authorized or qualified to do business in this State and whether for profit or not for profit. An association includes but is not limited to any business, charitable, fraternal, beneficial, historic, veterans, or labor organization, society, foundation, federation, lodge, club or order, or any subordinate association or auxiliary thereof, that is not incorporated.” W. Va. Code R. § 110-15-4a.3 (1993).

West Virginia Code of State Rules Section 110-15-4a.5 holds that, “The officers of a corporation or association that are personally liable for consumer [sic] sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or by-laws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who performs duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and trustees. A person such as an incorporator, shareholder, member or employee of a corporation or association is not considered to be an officer subject to personal liability.” W. Va. Code R. § 110-15-4a 5 (1993). Finally, according to West Virginia Code of State Rules Section 110-15-4a.5.2, “An officer may be personally liable whether or not the

officer was under a duty to pay the tax or was responsible for the payment of the tax, for or on behalf of the corporation or association, and whether or not the officer acted willfully, or with the intent to evade the tax or payment thereof.” W. Va. Code R. § 110-15-4a.5.2 (1993).

In the case of *Schmehl v. Helton*, 662 S.E.2d 697, 222 W.Va. 98 (2008), the West Virginia Supreme Court of Appeals looked to the Petitioner’s involvement as a corporate officer in order to ascertain whether imposing personal responsibility for unpaid consumers sales and service tax was warranted. The Court observed that:

[S]uch liability may be imposed only when such imposition is in an individual case not arbitrary and capricious or unreasonable, and such imposition is subject to a fundamental fairness test. The burden is on the person seeking to avoid such liability to show with clear and convincing evidence . . . that it would be fundamentally unfair, and an arbitrary and capricious or unreasonable act to impose such liability.

Schmehl at 707, 108.

The Petitioner in this case provided credible testimony as to his limited involvement with the company, especially during the periods of the assessment. While Petitioner did not have records as to when he removed his name from the company’s checking account or the line of credit from the Auto Parts store, valuable information can be gleaned from other documents that he provided. To begin with, Petitioner presented his 2006, 2007 and 2008 federal 1040 tax returns, which cover the entire assessment period. None of those returns show any profit or loss claimed from the company. Petitioner even produced his 2004 federal return, which also showed no profit or loss claimed from the company. That particular return is relevant for the fact that it was the first return that Petitioner filed following the opening of the company, and if any of his returns would show any business activity from that company, it would have been that return.²

All of Petitioner’s returns were prepared professionally. Of particular interest is Petitioner’s 2007 federal tax return, which was filed on January 29, 2008. At some point

² Petitioner’s 2004 federal return was not introduced into the record however, because it did not fall within the dates of assessment, and as such is not directly relevant as evidence.

subsequent to filing his 2007 federal return, Petitioner received in the mail a W2 that was sent to him late by Mr. B, one of Petitioner's employers in 2007. After receiving that W2 Petitioner hired a tax preparer to file an amended 2007 income tax return, federal form 1040X. This action demonstrates that Petitioner was conscientious about his taxes and made efforts to file accurate tax returns. This kind of conduct is contrary to the kind of behavior that would be expected from an officer who was not responsibly paying the taxes of his own company.

Finally, Petitioner testified that he did not have any responsibility over filing the tax returns for the company. Respondent's counsel noted that the officer assessment appears to have been based upon actual returns filed, as opposed to an estimated assessment, because the amounts assessed for each tax period were not numbers that had been rounded off. If the company filed tax returns that turned out to be deficient, the Respondent did not have evidence of these filings and that they bore Petitioner's signature. Although he briefly had signature authority on the company's checking account, Respondent did not have any checks that were made payable by the Petitioner to the Tax Department and submitted along with any sales tax returns that might have been filed. Petitioner also provided un rebutted testimony that his cousin was the individual responsible for the filing of the taxes.

The evidence adduced at the hearing supports Petitioner's contention that he was not employed by the company, during the periods of assessment. Petitioner provided un rebutted testimony that the company went out of business on June 30, 2005. If that much is true then the company was not in business during the periods of assessment. Additionally, the Respondent concedes that they have no tax records or documents evidencing Petitioner's signature as an individual responsible for the taxes of the business. As such, based upon the facts presented to the undersigned, it would be fundamentally unfair, in accord with *Schmehl, supra*, to hold Petitioner personally liable for the unpaid sales tax owed by the company, as assessed.

Petitioner has met his burden by clear and convincing evidence that he was not a responsible officer of the company, and as such is not personally responsible for that business' unpaid sales tax, as assessed.

CONCLUSIONS OF LAW

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment the burden of proof is upon the petitioner to show that any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

2. “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.” W. Va. Code Ann. § 11-15-3(a) (West 2010).

3. “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (West 2010).

4. “Each vendor shall collect from the purchaser the consumer sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1 (1993).

5. “If any vendor fails to collect the tax imposed by section three of this article, he shall be personally liable for such amount as he failed to collect.” W. Va. Code Ann. § 11-15-4(a) (West 2010).

6. Officers of an association or corporation “shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed . . . may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010).

7. “If the taxpayer or vendor is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default in the reporting or payment of taxes on the part of the association or corporation. Payment of the consumers sales and service tax and any additions to tax, penalties and interest thereon imposed by W. Va. Code § 11-10-1 et seq. may be enforced against such officers as against the association or corporation which they represent.” W. Va. Code R. § 110-15-17.1 (1993).

8. An association is defined as “any two or more persons who have voluntarily joined together to transact or engage in business activity, and who are not a corporation or partnership, whether or not the association is authorized or qualified to do business in this State and whether for profit or not for profit. An association includes but is not limited to any business, charitable, fraternal, beneficial, historic, veterans, or labor organization, society, foundation, federation, lodge, club or order, or any subordinate association or auxiliary thereof, that is not incorporated.” W. Va. Code R. § 110-15-4a.3 (1993).

9. “The officers of a corporation or association that are personally liable for consumer [sic] sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or by-laws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who performs duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and trustees. A person such as an incorporator,

shareholder, member or employee of a corporation or association is not considered to be an officer subject to personal liability.” W. Va. Code R. § 110-15-4a.5 (1993).

10. “An officer may be personally liable whether or not the officer was under a duty to pay the tax or was responsible for the payment of the tax, for or on behalf of the corporation or association, and whether or not the officer acted willfully, or with the intent to evade the tax or payment thereof.” W. Va. Code R. § 110-15-4a.5.2. (1993)

11. The West Virginia Supreme Court of Appeals has articulated a fundamental fairness test when it comes to holding officers personally responsible for the unpaid consumers sales and service taxes of a corporation or association. *Schmehl v. Helton*, 662 S.E.2d 697, 222 W.Va. 98 (2008).

12. Petitioner has met his burden by clear and convincing evidence that he was not a responsible officer of the company, and as such is not personally responsible for that business’ unpaid sales tax as assessed.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner personally, as a responsible officer of the company, in the amount of \$____, an amount including interest and additions, for tax periods March 31, 2006, through June 30, 2007, and tax periods ending September 30, 2007, December 31, 2007, March 31, 2008, and June 30, 2008, should be and hereby is **VACATED** in its entirety.

As a result of the outcome of this case, it is further **ORDERED** that Respondent release to Petitioner his 2010 state income tax return, in the amount of \$____, which is to be refunded to him, as represented by Respondent’s counsel at the evidentiary hearing.